

1983

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Recommended Citation

Tommy Leung, *Bank Mergers: Agency Review and the Changing Line of Commerce*, 11 Fordham Urb. L.J. 307 (1983).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol11/iss2/5>

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BANK MERGERS: AGENCY REVIEW AND THE CHANGING LINE OF COMMERCE

I. Introduction

Since the early days of our Nation, there has been a divergence of views on the merits of competition in the commercial banking field.¹

1. See S. REP. NO. 196, 86th Cong., 1st Sess. 16-18 (1959) (Senate Report on the regulation of bank mergers).

In 1790, Secretary of the Treasury Alexander Hamilton presented a plan for a national financial policy to the House of Representatives. Hamilton was the first to recognize the modern functions of a central bank. He foresaw a national, as well as an extra-large bank, leading to a uniform paper currency, government control of monetary policy and minimization of the risk of banking abuses. R. TIMBERLAKE, *THE ORIGINS OF CENTRAL BANKING IN THE UNITED STATES* 4-6 (1978).

The bill to charter the First Bank of the United States (First Bank) was passed by Congress in 1791. However, the First Bank's charter was not renewed in 1811 due to political opposition. The opposition was led by agrarians and businessmen who were against the First Bank's regulatory power over state banks. Note, *Federal Control Over the Money Market*, 1981 ARIZ. ST. L.J. 159, 166 & n.58.

Due to (1) heavy borrowing by the government necessitated by the War of 1812 and (2) the flood of paper money issued by the state banks, which was far in excess of what could be reasonably redeemed in specie, the Second Bank of the United States (Second Bank) was created in 1816. Note, *supra*, at 167. Under Nicholas Biddle, who became the president of the Second Bank in 1823, the central banking concept emerged. R. TIMBERLAKE, *supra*, at 28, 31. The demise of the Second Bank was again due to political reasons, as its constitutionality was made a presidential campaign issue in 1828. Andrew Jackson used opposition to the bank as one of his platforms. Note, *supra*, at 168-69.

After the Second Bank's charter lapsed in 1836, there was a period of economic chaos. The depression of 1837 was a direct result of the Second Bank's demise. Note, *supra*, at 169. From 1836 to 1863, this Nation witnessed an era of state, or free, banking. Many states enacted laws setting minimum qualifications to form banks, *id.* at 169-70, making it relatively simple to open a bank and issue bank notes. Hale, *Mergers of Financial Institutions*, 21 BUS. LAW. 211-12 (1965). The number of state banks grew from 713 in 1836 to 1,601 in 1861. Note, *supra*, at 170.

In 1864, Congress passed the National Bank Act (1864 Act). Act of June 3, 1864, ch. 106, § 5, 13 Stat. 100. This bill was a compromise to resolve the differences between the monopolistic Bank of the United States and the financial insecurity of free banking. Kintner & Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. INDUS. & COM. L. REV. 213-14 (1972). The 1864 Act provided for the establishment of nationally-chartered banks to be approved and regulated by the Comptroller of the Currency. Act of June 3, 1864, ch. 106, §§ 1, 12, 16-18, 20, 13 Stat. 99, 102, 104-05. Coupled with the revival of the state banking system, the passage of the 1864 Act led to the creation of today's dual banking system. Hale, *supra*, at 212.

The Federal Reserve Act, Act of Dec. 23, 1913, ch. 6, 38 Stat. 251, which established the Federal Reserve System in 1913, was a compromise between proponents of public control, who feared the establishment of a central bank controlled by a privileged few, and central banking proponents, who feared that government control would lead to political control. Note, *supra*, at 175-76. The Act provides for a decentralized system of 12 Federal Reserve Banks in different parts of the country under joint supervision by both the private and public sectors. *Id.* at 176.

During the late 1950's and early 1960's, this dichotomy of views focused on the applicability of federal antitrust laws² to bank mergers.³ Because of congressional vacillation in the area,⁴ the Department of Justice has taken the initiative in challenging proposed bank mergers which do not satisfy the antitrust criteria of the Sherman⁵ and Clayton Acts.⁶

A challenge to a proposed bank merger may come in the form of a civil suit charging a violation of either section 1 of the Sherman Act⁷ or section 7 of the Clayton Act,⁸ both of which prohibit anticompetitive mergers. Section 1 of the Sherman Act makes any "contract, combination, . . . or conspiracy, in restraint of trade or commerce" illegal.⁹ Section 7 of the Clayton Act¹⁰ prohibits any corporation from acquiring the stock of another corporation, or the assets of another corporation if the acquiring entity is subject to the jurisdiction of the Federal Trade Commission¹¹ (FTC), "where in any line of commerce

2. The conflict centered on the applicability of the Sherman Act, currently codified at 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, currently codified at 15 U.S.C. §§ 12-27 (1976), to bank mergers. *See* S. REP. NO. 196, 86th Cong., 1st Sess. 1-2, 19-21 (1959).

3. *See* S. REP. NO. 196, 86th Cong., 1st Sess. 1-2, 19-21 (1959).

4. *See* note 30 *infra* and accompanying text for a discussion of the vagueness inherent in the Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129 (amended 1966).

5. 15 U.S.C. §§ 1-7 (1976). The Sherman Act prohibits any contract, combination, or conspiracy in restraint of trade or commerce. *Id.* § 1. Section 2 of the Sherman Act provides that any person who monopolizes, attempts to monopolize, or combines or conspires with any other person to monopolize any part of trade or commerce is guilty of a felony. *Id.* § 2.

6. *Id.* §§ 12-27. The Clayton Act prohibits any acquisition which substantially lessens competition or tends to create a monopoly. *Id.* § 18.

7. *Id.* § 1.

8. *Id.* § 18.

9. *Id.* § 1.

10. *Id.* § 18.

11. In 1934, the Supreme Court severely curtailed the antitrust efforts of the Federal Trade Commission (FTC). By interpreting the phrase "substantial lessening of competition" differently from the FTC, the Court limited the Commission's regulatory power to mergers through pure stock acquisitions. *See* *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934). From 1930 to 1950, the FTC had almost no role to play in the determination of anticompetitive effects of mergers consummated via asset acquisition. This asset acquisition loophole was finally closed when the Celler-Kefauver amendments to § 7 were passed in 1950. Act of Dec. 29, 1950, ch. 1184, Pub. L. No. 81-899, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18 (1976)). D. MARTIN, *MERGERS AND THE CLAYTON ACT* 257-58 (1959); Austin, *The Evolution of Commercial Bank Merger Antitrust Law*, 36 BUS. LAW. 297-98 (1981). Historically, banks have almost always merged via asset acquisition. Kintner & Hansen, *supra* note 1, at 218. However, the FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. § 45(a)(6) (1976). Thus, commercial banks were exempt from § 7 of the Clayton Act until § 11 gave the

. . . in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly.”¹² The “line of commerce” refers to the relevant product market in which the merging firms are engaged. It is determined by the nature of the commercial entities involved, that is, the cluster of products and services which they offer, and by the nature of the competition which they face.¹³ The purpose of defining the line of commerce is to provide a basis for measuring the effects of a proposed combination on competition.¹⁴

The Justice Department’s main attack against proposed bank mergers has been based on the economic theory of actual competition.¹⁵ Actual competition describes the competitive effect firms operating in the same geographic market and the same line of commerce exert on each other.¹⁶ By applying the economic theory of actual competition and the general antitrust criteria set out in the Sherman and Clayton Acts, and by defining the line of commerce as commercial banking, the Department of Justice, as of 1981, succeeded in enjoining or otherwise thwarting every horizontal bank merger it has challenged.¹⁷

Federal Reserve Board (FRB) the power to apply it to banks. 15 U.S.C. § 21(a) (1976). All doubts concerning the applicability of § 7 to commercial banks were finally laid to rest in *Transamerica Corp. v. FRB*, 206 F.2d 163, 165 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953), where the Third Circuit, in setting aside the Federal Reserve Board’s order that a banking corporation must divest itself of stock held in other independent commercial banks, held that § 7 of the Clayton Act applied to bank mergers. After *Transamerica*, however, the issue of whether the Justice Department may use § 7 to contest bank mergers remained open.

12. 15 U.S.C. § 18 (1976).

13. *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350, 360 (1970) (merger between two banks in a small community held to violate § 7 of the Clayton Act).

14. *United States v. Continental Can Co.*, 378 U.S. 441, 457 (1964) (merger between the second largest producer of metal containers and the third largest producer of glass containers held to violate § 7 of the Clayton Act as the competition protected by § 7 is not limited to that between identical products). The broader the line of commerce is defined, the more permissive acquisition policy will be and the likelihood of finding substantially adverse competitive effects under the antitrust laws will be reduced. Bleier & Eisenbeis, *Commercial Banking as the “Line of Commerce” and the Role of Thrifts*, 98 *BANKING L.J.* 374, 386 (1981).

15. Austin, *supra* note 11, at 333-34.

16. *Id.* Thus, if the Justice Department finds that a combination between two or more firms directly competing in the same geographic market and the same line of commerce violates either § 1 of the Sherman Act or § 7 of the Clayton Act, it will bring suit.

17. Austin, *supra* note 11, at 363. *See, e.g.*, *United States v. Phillipsburg Nat’l Bank & Trust Co.*, 399 U.S. 350 (1970); *United States v. Third Nat’l Bank*, 390 U.S. 171 (1968) (merger between second and fourth largest banks in Davidson County, Tennessee, held to violate § 7 of the Clayton Act); *United States v. First Nat’l Bank & Trust Co.*, 376 U.S. 665 (1964) (merger between largest and fourth largest banks in Fayette County, Kentucky, held to violate § 7 of the Clayton Act).

The standards currently applied by the Justice Department to review the propriety of a proposed merger do not strictly conform, however, to those standards most recently promulgated by Congress for the banking industry.¹⁸

These conflicting criteria have caused confusion among the bank regulatory agencies and within the banking industry with respect to two important issues: (1) whether the antitrust laws should be applied to bank mergers within the vacuum of Justice Department analysis or whether there should be a greater emphasis on agency participation in reviewing proposed mergers, and (2) whether commercial banking should continue as the relevant line of commerce when antitrust standards are applied.

II. Judicial Construction of the Bank Merger Acts

During the 1950's, there was a perceived inability by the Federal government to act under existing antitrust law¹⁹ and control the alarming number of bank mergers.²⁰ As a result,²¹ Congress enacted

18. The Bank Merger Act of 1966 established uniform standards to be applied by the courts, the Department of Justice, and the bank regulatory agencies. For a discussion of the Bank Merger Act of 1966, see notes 40-48 *infra* and accompanying text (original version at ch. 323, § 7, 38 Stat. 730, 731-32 (1914)).

19. Prior to the Supreme Court's decision in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), discussed in text accompanying notes 31-38 *infra*, the Department of Justice recognized that it had no jurisdiction under § 7 of the Clayton Act to enjoin asset acquisitions by banks. 374 U.S. at 377-78. *See also Hearings Before the Senate Comm. on Banking and Currency*, 85th Cong., 1st Sess., pt. 2, 1030 (1957) (study of banking law) (statement by Attorney General Brownell recognizing that asset acquisitions by banks were not covered by § 7 of the Clayton Act).

Although the Sherman Act could have been used to enjoin most mergers, its application was made difficult after the Supreme Court set forth the broad "rule of reason" test in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (combination of oil companies held to violate the Sherman Act since it constituted an unreasonable and undue restraint of trade), and *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (acquisition by U.S. Steel of another steel corporation held not to violate the Sherman Act). In both cases, the Supreme Court held that the Sherman Act prohibited only *unreasonable* restraints, and not all possible restraints of trade. *Columbia Steel*, 334 U.S. at 522; *Standard Oil Co.*, 221 U.S. at 60. The Government never brought suit to enjoin a bank merger under this Act until 1959 in *United States v. Firstamerica Corp.*, No. 38139 (N.D. Cal. Mar. 30, 1959), *cert. denied*, 361 U.S. 928 (1960) (§ 11 of the Clayton Act does not give the bank regulatory agencies exclusive jurisdiction over bank mergers).

20. *See* HOUSE COMM. ON BANKING AND CURRENCY, BANK MERGERS AND CONSOLIDATIONS, H.R. REP. NO. 1416, 86th Cong., 2d Sess. 3, *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 1995, 1996 (House of Representatives Report accompanying the Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129 (1960) (amended 1966), discussed in notes 22-30 *infra* and accompanying text, setting forth the purpose and legislative history of the Act).

the Bank Merger Act of 1960²² (BMA-60). The bill was introduced to provide restrictions against mergers and consolidations of federally insured banks.²³ One faction wanted to extend the reach of the anti-trust statutes to include banks.²⁴ The opposing faction, led by the banking industry, favored special interest legislation to insulate commercial banks from the antitrust laws.²⁵

Under BMA-60, the Federal Reserve Board (FRB) the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) were each given approval power over certain types of mergers.²⁶ In addition to determining the competitive effects²⁷ of a proposed merger, the agencies were required to consider six other factors including: (1) the financial history and condition of each of the banks involved; (2) the adequacy of its capital structure; (3) its future earnings prospects; (4) the general character of its management; (5) the convenience and needs of the community to be served; and (6) whether the bank's corporate powers are consistent with the purpose of the Federal Deposit Insurance Act.²⁸ Although as

21. HOUSE COMM. ON BANKING AND CURRENCY, *BANK MERGERS AND CONSOLIDATIONS*, H.R. REP. NO. 1416, 86th Cong., 2d Sess. 3-5, *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 1995, 1996-98.

22. Pub. L. No. 86-463, 74 Stat. 129 (1960) (amended 1966).

23. 105 CONG. REC. 2283 (1959); HOUSE COMM. ON BANKING AND CURRENCY, *BANK MERGERS AND CONSOLIDATIONS*, H.R. REP. NO. 1416, 86th Cong., 2d Sess. 1, *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 1995, 1995.

24. Whitesell & Kamens, *Bank Expansion: The Politics of Supreme Court Decisions*, 91 BANKING L.J. 748, 751 (1974). This faction was led by the Department of Justice and Congressman Celler, who was Chairman of the House Judiciary Committee. See *Regulation of Bank Mergers, 1959: Hearings on S. 1062 Before the Senate Comm. on Banking and Currency*, 86th Cong., 1st Sess. 12-13, 86 (1959) (hearings on a bill to provide safeguards against mergers and consolidations of banks which might violate the antitrust laws).

25. The bankers' position was in response to the decision in *United States v. Firstamerica Corp.*, No. 38139 (N.D. Cal. Mar. 30, 1959), *cert. denied*, 361 U.S. 928 (1960), which held that § 11 of the Clayton Act did not give the bank regulatory agencies exclusive jurisdiction over bank mergers. Austin, *supra* note 11, at 299.

26. The FRB was given jurisdiction if the merger resulted in a state bank which is a member of the Federal Reserve System; if the merger resulted in an insured nonmember state bank, the FDIC had jurisdiction; if the merger resulted in a national bank or a District of Columbia bank, the OCC was given approval authority. Pub. L. No. 86-463, 74 Stat. 129 (1960) (amended 1966).

27. The competitive factor was the effect of the proposed merger on competition, including any tendency toward monopoly. *Id.*

28. HOUSE COMM. ON BANKING AND CURRENCY, *BANK MERGERS AND CONSOLIDATIONS*, H.R. REP. NO. 1416, 86th Cong., 2d Sess. 1, *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 1995, 1995.

Congress ruled out the notion that competitive factors should be controlling and, instead, opted for this balanced approach. Hale, *supra* note 1, at 213. For a further

originally drafted the legislation was thought by many to grant exclusive jurisdiction over approval of bank mergers to the bank regulatory agencies,²⁹ the bill's opponents succeeded in moderating the final language of the bill enough to leave the jurisdictional question open to judicial interpretation.³⁰ The first opportunity for Supreme Court interpretation of BMA-60 was presented in the landmark case of *United States v. Philadelphia National Bank*³¹ (PNB).

In PNB, the Philadelphia National Bank and the Girard Coin Exchange Trust Company, the second and third largest banks in Philadelphia, sought to merge. If consummated, the resulting bank would have been Philadelphia's largest. Although the OCC approved the merger,³² the Department of Justice filed suit to enjoin it. Among the issues presented was whether section 7 of the Clayton Act was applica-

discussion of the events and circumstances leading up to the passage of BMA-60 and its legislative history, see Wu & Connell, *Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers*, 59 VA. L. REV. 860, 862-63 (1973); Note, *A Legislative History of the 1960 Bank Merger Act and Its 1966 Amendment: Judicial Misuse and a Suggested Approach*, 44 IND. L.J. 596 (1969).

Neither BMA-60 nor its successor, BMA-66, 12 U.S.C. § 1828(c) (1976), covers bank holding companies (BHCs). Congress passed the Bank Holding Company Act (BHCA), ch. 240, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841-1843, 1849 (1976)), in 1956 and gave the FRB regulatory control over BHCs. BHCs began to merge and the BHCA had to be amended in 1970 to provide for regulatory control. Although discussion of BHCs is beyond the scope of this Comment, it should be noted that the competitive standards written into the BHCA in 1970 are identical to those in BMA-66. See notes 44-46 *infra* and accompanying text for a discussion of the competitive standards of BMA-66. See also *County Nat'l Bancorp. v. FRB*, 654 F.2d 1253, 1256 (8th Cir. 1981) (order denying the acquisition by a BHC of another BHC vacated as the FRB considered anticompetitive factors which were more stringent than those mandated in the BHCA); S. REP. NO. 1179, 89th Cong., 2d Sess. 9, 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2385, 2393-94 (bill to amend the BHCA of 1956).

29. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 383 (1963) (Harlan, J., dissenting); S. REP. NO. 196, 86th Cong., 1st Sess. 24 (1959); 106 CONG. REC. 7257 (1960); Note, *supra* note 28, at 604, 608.

30. See Kintner & Hansen, *supra* note 1, at 222, 225. For instance, the role the Justice Department was to play with respect to approvals or denials of bank mergers was never clearly spelled out in BMA-60. While such authority was placed in the hands of the regulatory agencies, BMA-60 also provided that the reviewing agency shall request a report on the competitive factors from the Attorney General. However, the exact weight to be given to the Attorney General's report was not discussed. See Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129 (amended 1966).

31. 374 U.S. 321 (1963).

32. The OCC found that the merger would be in the public interest. See letter from H.S. Haggard, Deputy Comptroller of the Currency, to Frederic A. Potts, president of the Philadelphia National Bank (Feb. 28, 1961) (confirming the Comptroller's decision of Feb. 24, 1961). The Comptroller's decision was orally conveyed to Mr. Potts in a telephone conversation, but apparently, no formal decision was prepared. Letter from Marie Giblin, Communications Division, Office of the Comptroller of the Currency (Nov. 15, 1982).

ble to bank mergers.³³ The Court held that the proposed consolidation would violate section 7 of the Clayton Act and issued a permanent injunction to enjoin the merger.³⁴ Disregarding the mitigating factors³⁵ set out in BMA-60,³⁶ the Court announced that the relevant line of commerce was commercial banking.³⁷ In addition, the Court did not interpret BMA-60 as a grant to the banking agencies of exclusive jurisdiction over merger approvals.³⁸

Dissatisfied with the Supreme Court's interpretation of BMA-60,³⁹ Congress enacted the Bank Merger Act of 1966⁴⁰ (BMA-66) to amend

33. The Department of Justice contended that the proposed merger would violate § 7 of the Clayton Act. *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 351 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1963). However, the merging banks argued that the OCC's decision to approve the merger was final and that BMA-60 precluded a review of the proposed merger under antitrust laws. *Id.* at 355-56.

34. *Philadelphia Nat'l Bank*, 374 U.S. at 355-72.

35. See text accompanying note 28 *supra*.

36. Referring to the legislative history of BMA-60, Justice Harlan noted that: "Time and again it was repeated that effect on competition was *not to be the controlling factor* in determining whether to approve a bank merger, that a merger could be approved as being in the public interest even though it would cause a substantial lessening of competition." *Philadelphia Nat'l Bank*, 374 U.S. at 382 (Harlan, J., dissenting).

37. The Court found that commercial banks furnish products and services which are unique, cost advantageous, and enjoy settled consumer preference and that these factors suffice to insulate commercial banks from competition from other sources. An example of such products and services include demand deposits (checking accounts) and various kinds of credit. *Id.* at 356.

38. Prior to BMA-60, the Department of Justice considered banks exempt from antitrust laws due to their regulated status. Comment, *Bank Mergers and Potential Competition*, 43 *FORDHAM L. REV.* 767, 769 (1975). Henceforth, the Justice Department brought several more suits under the Sherman and Clayton Acts in the Supreme Court to enjoin horizontal bank mergers. It was successful in every such case. See note 17 *supra*. The Department of Justice's success rate has transformed its advisory role into one which is vested with an indirect power to approve. See notes 92 & 94-96 *infra* and accompanying text.

39. Senator Robertson, Chairman of the Senate Banking and Currency Committee, and a principal author of BMA-60, remarked that the *PNB* decision did not come close to reflecting congressional intent. 109 *CONG. REC.* 11,097 (1963). Senator Robertson noted that the amendment to BMA-60

will end the confusion and controversy which has surrounded the bank merger situation since the ill-advised and unfortunate decisions of the Supreme Court in *Philadelphia [PNB]* and *Lexington [United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964)]* cases and the district court decision in the New York case [*United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867 (S.D.N.Y. 1965)*, discussed at note 62 *infra*] which followed these precedents. . . . [BMA-66] will strike the *Philadelphia*, *Lexington*, and *New York* decisions and opinions from the books.

112 *CONG. REC.* 2652 (1966). See *United States v. Third Nat'l Bank*, 390 U.S. 171, 177 (1968).

40. S. 1698, 89th Cong., 1st Sess., 111 *CONG. REC.* 6919 (1965) (presently codified at 12 U.S.C. § 1828(c) (1976)).

BMA-60. A principal motive for enacting BMA-66 was to clarify the extent to which the antitrust laws could be applied to bank mergers.⁴¹ One congressional faction asserted that banking is a unique industry which requires special expertise in determining where the public interest lies in a given bank merger situation, and that once a merger is approved by the appropriate agency, it should be immune from anti-trust scrutiny.⁴² Opponents of this view argued that banking should not be treated differently from other industries when deciding questions of competition and that the public interest is not a mitigating factor to be considered.⁴³

BMA-66 established a single set of standards to be applied by the regulatory agencies, the Department of Justice and the courts under the antitrust laws.⁴⁴ These standards are stricter than those provided in BMA-60.⁴⁵ Moreover, in addition to considering the effects of a merger on competition, BMA-66 also mandates that courts must weigh the convenience and needs of the community served by the merging firms.⁴⁶ If the proposed merger was approved by one of the regulatory agencies, its consummation was stayed for thirty days to

41. HOUSE COMM. ON BANKING AND CURRENCY, BANK MERGERS—REVIEW PROCEDURE, H.R. REP. NO. 1221, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 1860, 1861. Congress passed BMA-66 to alter the procedures by which the Justice Department would challenge bank mergers and alter the legal standard which courts use in judging those mergers. *United States v. Third Nat'l Bank*, 390 U.S. at 177.

42. HOUSE COMM. ON BANKING AND CURRENCY, BANK MERGERS—REVIEW PROCEDURE, H.R. REP. NO. 1221, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 1860, 1861.

43. *Id.*

44. *Id.* at 1, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 1860, 1860. "The bill [BMA-66] would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws" Essentially, this single set of standards is the effect of the proposed bank merger on competition and on the convenience and needs of the community to be served. *See* 12 U.S.C. § 1828(c)(5) (1976).

45. HOUSE COMM. ON BANKING AND CURRENCY, BANK MERGERS—REVIEW PROCEDURE, H.R. REP. NO. 1221, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 1860. Unlike BMA-60, BMA-66 incorporates language from the Sherman and Clayton Acts in § 5 to measure the competitive effects of the merger. *Compare* 12 U.S.C. § 1828(c)(5) (1976) *with* Pub. L. No. 86-463, 74 Stat. 129 (1960) (amended 1966), 15 U.S.C. § 1 (1976), and *id.* § 18.

46. *See* HOUSE COMM. ON BANKING AND CURRENCY, BANK MERGERS—REVIEW PROCEDURE, H.R. REP. NO. 1221, 89th Cong., 2d Sess. 4, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 1860, 1860, 1863. For examples of what constitutes "convenience and needs to the community," see *United States v. First Nat'l Bank*, 301 F. Supp. 1161, 1210-20 (S.D. Miss. 1969). Some of these factors include the offering of trust services, student loans, and mortgages. *Id.*

give the Justice Department an opportunity to enjoin it. After the lapse of the thirty days, the merger was immune from further attack under the antitrust laws,⁴⁷ with the exception of suits filed under section 2 of the Sherman Act.⁴⁸

In its first opportunity to construe BMA-66, the Supreme Court held that the Justice Department could continue to challenge proposed bank mergers under the Clayton Act, but must consider the mitigating factors, which had been previously disregarded. In *United States v. First City National Bank*⁴⁹ (FCNB), the Justice Department had brought suit under section 7 of the Clayton Act to enjoin a merger between the First City National Bank of Houston and the Southern National Bank of Houston. The merger had been approved by the OCC under the convenience and needs standard of BMA-66.⁵⁰ The Court held that the Department of Justice could challenge a bank merger using the Clayton Act because the basis of the action existed under the *antitrust* laws and not under BMA-66. Thus, there was no defect in the pleadings.⁵¹ The Court stated further that the convenience and needs standard of BMA-66 serves only as a new defense or justification to the merger's proponents.⁵² The onus of proving that the merger would serve the convenience and needs of the community was on the merging banks.⁵³

47. BMA-66 also: (1) exempted mergers consummated prior to the *PNB* decision from the antitrust laws, except for § 2 of the Sherman Act; (2) exempted any merger consummated after the *PNB* decision and before enactment of BMA-66 if no antitrust suit had been filed against it; and (3) required the courts to use the new standards in all cases brought under the antitrust laws after the *PNB* decision. HOUSE COMM. ON BANKING AND CURRENCY, BANK MERGERS—REVIEW PROCEDURE, H.R. REP. NO. 1221, 89th Cong., 2d Sess. 1-2, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 1860, 1860-61.

48. See note 5 *supra* for the scope of § 2.

49. 386 U.S. 361 (1967). This case was decided along with a companion case, *United States v. Provident Nat'l Bank*.

50. 386 U.S. at 364.

51. *Id.* at 363-64.

52. *Id.* at 363.

53. *Id.* at 366. In espousing the convenience and needs to the community test, the Court felt that this defense was remotely related to the failing company doctrine. *Id.* at 369. The failing company doctrine is a defense to an action brought under § 7 of the Clayton Act. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). In *International Shoe*, the Supreme Court held that a corporation with depleted resources, remote prospects of rehabilitation, and facing a grave possibility of business failure with resulting loss to its shareholders and injury to the communities where its plants were located, could be purchased by a competitor without violating the Clayton Act. *Id.* at 301. However, the Court in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), gave a narrow interpretation to this defense. *Citizen Publishing* set forth

III. Jurisdiction

A. Agency vs. Justice Department Review-Varying Standards

In light of Congress' expressed intent to provide uniform standards for the approval or disapproval of bank mergers, the Justice Department should not independently apply the antitrust laws to bank mergers. It has been asserted that the regulatory agencies are more qualified to judge the impact of mergers than the Department of Justice.⁵⁴ One commentator has suggested that economic research to define the relevant market area, which is used to determine the competitive effects of a merger, should be performed by the regulatory agencies and outside scholars, not by the Department of Justice.⁵⁵

Recent lower court decisions indicate that evidence produced by the merging banks and relied upon by the bank regulatory agencies may present a truer picture of the market and therefore be more relevant than evidence produced by the Justice Department. For example, in *United States v. First National Bank*,⁵⁶ the court had to use evidence

two requirements before this defense could be used. First, there had to be a grave probability of business failure. Second, no other prospective purchasers must be available. *Id.* at 137-38.

While *FCNB* decided the procedural issues of BMA-66, its substantive aspects were decided in *United States v. Third Nat'l Bank (TNB)*, 390 U.S. 171 (1968). In that case, the second and fourth largest banks in Davidson County, Tennessee, sought to merge, which would result in that county's largest bank. The Supreme Court held that the merger tended to lessen competition and that the "convenience and needs" of the merger did not outweigh its anticompetitive effects. In so holding, the Court established a two-prong test for the "convenience and needs" defense: (1) Does the merger violate the Clayton Act standard embodied in BMA-66? (2) If so, are the anticompetitive effects of the proposed merger clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served? *Id.* at 181-82.

Although the Court rejected the Justice Department's contention that the convenience and needs doctrine was a mere restatement of the failing company doctrine, it narrowly defined the convenience and needs defense by holding that "before a merger injurious to the public interest is approved, a showing [must] be made that the gain expected from the merger cannot reasonably be expected through other means." *Id.* at 190. Thus, the Court in *TNB* made the existence of "convenience and needs" extremely difficult to establish. Whitesell & Kamens, *supra* note 24, at 760.

54. Comment, *supra* note 38, at 789. Judge MacMahon, who rendered the opinion in *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D.N.Y. 1965) (three-year old bank merger between the Manufacturers Trust Company and the Hanover Bank held to violate both the Sherman and Clayton Acts), also conceded that the banking agencies had more technical expertise. *Id.* at 880.

55. Austin, *supra* note 11, at 369.

56. 301 F. Supp. 1161 (S.D. Miss. 1969). The Justice Department sought to enjoin the proposed merger between the second and fifteenth largest banks in Mississippi. *Id.* at 1163. The district court held that the proposed merger would not have any adverse or anticompetitive effects and that it met the convenience and needs of the community to be served. *Id.* at 1230-31.

produced by the defendants because the Government's witnesses were never at the scene and, as a result, lacked first-hand knowledge of the relevant product market and local customer preferences.⁵⁷ In *United States v. Crocker-Anglo National Bank*,⁵⁸ the court found that the Department of Justice "relied on an expert who had absolutely no familiarity with [market conditions in] the state of California and who could not claim to be a financial expert."⁵⁹ The court in *United States v. Deposit Guaranty National Bank*⁶⁰ had to use evidence offered by the acquiring bank since the merger guidelines adopted by the Justice Department were not applicable.⁶¹ In *United States v. Manufacturerees Hanover Trust Co.*⁶² (MHT), Judge MacMahon noted that the Attorney General's report "was superficial and permeated with erroneous assumptions of fact as well as errors of law."⁶³

The evidence used by regulatory agencies includes data reflecting a broader product market.⁶⁴ After the PNB decision, the banking agencies adhered to the Supreme Court's definition of the line of commerce. The FRB, however, has acknowledged recently that competition from thrifts is a factor to be considered when evaluating the competitive effects of a proposed merger, especially in the northeast, where thrifts are large and play a major role in providing financial services.⁶⁵ In 1980, the FRB approved at least two merger applications involving actual competitors in which substantial thrift competition

57. *Id.* at 1182-83.

58. 277 F. Supp. 133 (N.D. Cal. 1967). The district court found that the proposed merger between the Crocker-Anglo National Bank of San Francisco and the Citizens National Bank of Los Angeles did not violate BMA-66, the Sherman Act, or the Clayton Act. *Id.* at 169, 200.

59. *Id.* at 171.

60. 373 F. Supp. 1230 (S.D. Miss. 1974). The defendant moved to set aside a consent judgment which prohibited it from making an acquisition without the consent of the Justice Department. *Id.* at 1230-31. The district court held that the proposed acquisition constituted a foothold acquisition and thus was not precluded by the prior consent decree. *Id.* at 1241.

61. *Id.* at 1238.

62. 240 F. Supp. 867 (S.D.N.Y. 1965). The Justice Department sought to divest a three-year old bank merger, although the bank regulatory agencies and the New York Superintendent of Banks had found that the merger would not have any adverse competitive effects. *Id.* at 875-77. The district court held that the merger violated both the Sherman and Clayton Acts and ordered the parties either to reach an agreement regarding the undoing of the merger or, failing that, to submit to the court for suitable relief. *Id.* at 956.

63. *Id.* at 884.

64. See Bleier & Eisenbeis, *supra* note 14, at 379; notes 65-75 *infra* and accompanying text.

65. Bleier & Eisenbeis, *supra* note 14, at 379.

was an important factor,⁶⁶ and in 1981, three such applications were approved.⁶⁷

The FRB first treated thrifts as actual competitors in *Fidelity Union Bancorp.*⁶⁸ At that time, the FRB appeared to recognize that concentration ratios based on commercial bank deposits alone are distorted where thrifts have a significant influence in the market.⁶⁹ On the day *Fidelity Union Bancorp.* was decided, the FRB issued a letter⁷⁰ to all Federal Reserve Banks urging them to develop data on thrift competition where it might be relevant.⁷¹ Although the FRB has yet formally

66. Hawke, *Competitive Factors: Review of 1980 Fed Decisions*, Legal Times of Wash., Feb. 23, 1981, at 26, col. 2. See The Bank of New York, 66 Fed. Res. Bull. 807 (1980) (merger between ninth and twenty-fourth largest banks in New York approved by the FRB because the convenience and needs of the community to be served by the merger outweighed the adverse competitive effects); Key Banks, Inc., 66 Fed. Res. Bull. 781 (1980) (acquisition by a BHC of a commercial bank approved by the FRB because its consummation would not significantly increase the concentration of commercial banking resources in New York).

67. See United Bank of New York, 67 Fed. Res. Bull. 861 (1981) (acquisition by the fifteenth largest banking organization in New York of the sixty-fifth largest bank in New York approved by the FRB as the acquisition would not significantly increase the concentration of banking resources in the state); Isabella Bank and Trust, 67 Fed. Res. Bull. 866 (1981) (merger between the 102d and the 328th largest banks in Michigan approved by the FRB because the consummation would not have an appreciable effect on the concentration of banking in the state); United Bank Corp., 67 Fed. Res. Bull. 358 (1981) (acquisition by the sixteenth largest banking organization in New York of another commercial bank approved by the FRB because the consummation would not result in a significant increase in the concentration of banking resources in the state).

68. 66 Fed. Res. Bull. 576 (1980). In *Fidelity Union Bancorp.*, a BHC applicant sought to acquire the shares of the Garden State National Bank. *Id.* The FRB approved the acquisition because competition from thrifts served to diminish the adverse effects of the acquisition on banking structure and concentration in New Jersey. In addition, the FRB found that the convenience and needs of the community to be served outweighed any adverse competitive effects. *Id.* at 577-78.

69. Hawke, *supra* note 66, at 29, col. 3.

70. The letter conveyed instructions from the FRB that thrifts "should be included in the overall competitive analysis in certain cases presented to the board" and that while the emphasis to be accorded thrifts may "vary with the circumstances of each case," it may be appropriate in some cases "that *these institutions should be considered as basically equivalent to commercial banks.*" Letter from William W. Wiles, Associate Director, Division of Banking Supervision Regulation, to all Federal Reserve Banks (June 25, 1980), *partially reprinted in* Hawke, *supra* note 66, at 29, col. 3 (emphasis added). The thrift competition argument fared better after the letter was sent. Hawke, *supra* note 66, at 29, col. 4.

71. See, e.g., Republic of Texas Corp., 67 Fed. Res. Bull. 57, 59 (1980) ("thrift institutions in San Antonio compete sufficiently with commercial banks in the provision of financial services to customers that the competition afforded by thrift institutions serves to reduce the adverse competitive effects associated with the merger of these commercial banking organizations").

to include thrifts in the product market,⁷² "[w]here . . . thrifts can be shown to be a significant competitive force, the board appears . . . prepared to take that fact into account in its qualitative analysis of the market."⁷³

Meanwhile, the OCC appears to have gone even further in recognizing the presence and role of thrifts.⁷⁴ In fact, both the OCC and the FDIC have formally expanded the line of commerce to include thrifts as full competitors of commercial banks in Maine.⁷⁵

B. Effect of Multi-Agency Review

Independent action by the Justice Department leads to confusion among the banking agencies, and makes it difficult to reconcile the Justice Department's reaction to the agencies' decisions. For instance, in *Southwest Mississippi Bank v. Federal Deposit Insurance Corp.*,⁷⁶ the FDIC had approved a merger between the Southwest Mississippi Bank and the Bank of McComb, despite an adverse report from the FRB.⁷⁷ However, when the FDIC later received adverse reports from

72. Hawke, *supra* note 66, at 34, col. 1.

73. *Id.* See, e.g., United Bank Corp. of New York, 67 Fed. Res. Bull. 861, 862 (1981); Isabella Bank and Trust, 67 Fed. Res. Bull. 866, 867 (1981); United Bank Corp., 67 Fed. Res. Bull. 358, 359 (1981).

74. See, e.g., Decision of the Comptroller of the Currency on Application to Merge Connecticut National Bank, Bridgeport, Fairfield County, Connecticut, into Hartford National Bank and Trust Company, Hartford, Hartford County, Connecticut, Mar. 26, 1982, at 2-5, 9-11.

75. Bleier & Eisenbeis, *supra* note 14, at 380 & nn. 13-14. At least two states in the northeast have abolished the distinction between thrifts and commercial banks when determining competitive effects. In New York, the Superintendent of Banks issued Supervisory Policy G6 in 1979 to establish branching policy for banking organizations. Section 6.3 lumps thrifts and commercial banks together when determining competition. [1979] 3 N.Y.C.R.R. § 6.3. On June 16, 1982, Massachusetts passed a bill (ch. 155) to revise the laws governing state-chartered savings banks, cooperative banks, and trust companies. Under the new law, all financial institutions would be able to offer the same financial services by 1986, thus "razing regulatory barriers between thrifts, commercial banks, and trust companies." *Mass. Omnibus Bank Bill is Law*, 39 WASH. FIN. REP. (BNA) 80 (July 12, 1982).

76. 499 F. Supp. 1 (S.D. Miss. 1979), *aff'd*, 625 F.2d 1013 (5th Cir. 1980).

77. *Id.* at 4. The FDIC had assigned a field examiner to investigate the proposed consolidation. The examiner found that the proposed merger would have a positive effect on competition. *Id.* at 3. However, in the interim, the FRB sent the FDIC an advisory opinion stating that the proposed merger would have adverse competitive effects. *Id.* at 4. The plaintiffs then commissioned an economist experienced in banking matters to evaluate the situation. Upon receipt of the economist's report, the FDIC concurred with the field examiner's determination and approved the merger. *Id.*

the Attorney General and the OCC, it reversed its decision and disapproved the merger.⁷⁸

In short, the regulatory agencies are forced to look over their shoulders in anticipation of Justice Department preemption.⁷⁹ As a result, the agencies have become so overly cautious that they are now applying standards which are stricter than those required under current antitrust law. Hence, FRB decisions to disapprove mergers have been reversed in the Eighth Circuit⁸⁰ and the Fifth Circuit,⁸¹ an FDIC decision to disapprove a merger has been reversed by the Ninth Circuit.⁸²

The Justice Department's actions also lead to confusion within the banking industry itself. Because the regulatory agencies have a broader definition of the line of commerce, their views on the anti-competitive effects of certain proposed mergers are at variance with the Department of Justice. The Justice Department has failed to recognize the significance in the congressional grant to the banking agencies of responsibility for evaluating proposed bank mergers and of power to approve or disapprove. Considering the short period of time Congress gave to the Department of Justice to challenge an agency-

78. After the FDIC had approved the merger, it sent the economist's report to the FRB, the OCC and the Attorney General. The FRB did not qualify its initial findings or submit an amended report. The OCC and the Attorney General then submitted their reports and they both found that the proposed merger would have a substantial adverse effect on competition. Upon receipt of these reports, the FDIC reversed its position and denied the merger application. *Id.* at 4-5.

79. Austin, *supra* note 11, at 326. Hence, the Justice Department's advisory report became required reading for the regulatory agencies and the subject of dissection and analysis by the agencies to determine the exact position of the Justice Department. *Id.*

80. County Nat'l Bancorp. v. FRB, 654 F.2d 1253 (8th Cir. 1981) (order by FRB denying application of a BHC to acquire control of another bank vacated because the FRB considered anticompetitive factors which were more stringent than those required under the BHCA).

81. Republic of Texas Corp. v. FRB, 649 F.2d 1026 (5th Cir. 1981) (decision of FRB to reject a BHA's application to acquire a commercial bank remanded because the FRB failed to make adequate findings).

82. Washington Mut. Sav. Bank v. FDIC, 482 F.2d 459 (9th Cir. 1973) (decision by FDIC to withhold approval of proposed consolidation of two thrift institutions enjoined because the FDIC used an anticompetitive standard which was more stringent than the antitrust laws).

The FDIC, especially, has a reputation for being highly restrictive in the bank merger area and its standards have occasionally gone beyond the bounds of existing antitrust law. Fischer, *Geographic Markets under the Microscope: The Proximity Theory Fails a Test*, 98 BANKING L.J. 463, 467 (1981). See generally Metzger & Greenfield, *Agency Discretion to Deny Bank Mergers: What are the Limits?* 98 BANKING L.J. 838 (1981), for a discussion of the broad, discretionary powers of the bank regulatory agencies to deny bank mergers.

approved merger, it is reasonable to assume that, at the very least, Congress intended the banking agencies to have a substantial advisory role in evaluating the competitive effects of a proposed merger.⁸³

Because of its highly regulated nature, banking is often regarded as a unique industry requiring the application of special guidelines.⁸⁴ Yet, while the banking agencies are attempting to conform their regulations to these guidelines by adopting the convenience and needs test, the Department of Justice continues to apply general antitrust standards as defined under the Sherman and Clayton Acts.⁸⁵

Justice Department preemption is likely to lead to inefficient, duplicative review. For example, in *MHT*,⁸⁶ the FDIC, the OCC and the New York Superintendent of Banks submitted reports to the FRB in favor of a proposed merger between the Manufacturers Trust Company and the Hanover Bank.⁸⁷ Despite opposition from the Justice Department, the FRB gave final approval.⁸⁸ The Justice Department, using different criteria to measure the adverse competitive effects, challenged and successfully blocked the merger.⁸⁹

83. Thus, the agencies and the Justice Department are applying inconsistent antitrust standards. Generally, the regulatory agencies tend to be more lenient. For instance, the regulatory agencies approved 97.7% of the over-1600 merger applications they received during the 1960's. Comment, *supra* note 38, at 790-91. Meanwhile, the Justice Department found adverse competitive effects in 59.8% of these same applications. *Id.*

84. Austin, *supra* note 11, at 297. Congress included such guidelines in BMA-60 and BMA-66. See *United States v. First City Nat'l Bank*, 386 U.S. 361, 364 (1967) (BMA-66); *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665, 679-80 (1964) (Harlan, J., dissenting) (BMA-60). "Ever since the days of the first and second Banks of the United States and *McCulloch v. Maryland* (4 Wheat. 316, 1819) [sic], it has been generally accepted that banking is a field subject to special regulation by virtue of its effect upon and relation to the fiscal and monetary policies of the Federal Government under article I, section 8, of the Constitution of the United States." S. REP. NO. 196, 86th Cong., 1st Sess. 16 (1959).

85. See, e.g., *United States v. Marine Bancorp.*, 418 U.S. 602 (1974) (OCC's decision to approve a proposed merger between two banks in Washington affirmed because the Justice Department failed to prove that the merger would violate the Clayton Act); *Third Nat'l Bank*, 390 U.S. 171 (1968); *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

86. 240 F. Supp. 867 (S.D.N.Y. 1965).

87. *Id.* at 876-77.

88. *Id.* In *MHT*, the participants had already consummated their merger prior to the suit brought by the Justice Department. Thus, after the district court held in favor of the Justice Department, the divestiture of the merger was very difficult due to the nature of the assets of commercial banks. Fortunately, since the merger was consummated prior to the *PNB* decision, the grandfather provisions of BMA-66 effectively nullified the district court's decision and divestiture was not required. See note 47 *supra*.

89. 240 F. Supp. at 956.

C. Justice Department Predominance

At present, the Justice Department is free to bring suit whenever it disagrees with a banking agency's approval of a proposed merger.⁹⁰ To many of the smaller banks, the mere filing of a suit by the Justice Department is akin to a denial.⁹¹ The Justice Department's ability to intimidate commercial banks into abandoning a proposed merger is well established.⁹² Between 1961 and 1970, of the thirty-seven suits filed by the Government, sixteen were won by the Justice Department when the parties abandoned the proposed merger before trial.⁹³ Because smaller banks have limited time and resources, they would rather drop the proposed merger than risk the chance of losing to the Department of Justice after lengthy litigation.⁹⁴ For these banks, the most significant consideration is that the Justice Department has never lost an actual competition case which reached final adjudication.⁹⁵

Since 1970, banks have either abandoned the proposed merger, accepted a consent decree or lost to the Justice Department when the merger involved actual competition.⁹⁶ In addition, the amendments to the Expediting Act of 1974⁹⁷ forced civil antitrust litigation through

90. BMA-66 provides that the responsible agency must notify the Attorney General of any approved merger and that, unless an emergency exists, such as the probable failure of one of the merging banks, the transaction be stayed for thirty days to give the Justice Department an opportunity to enjoin it. See 12 U.S.C. § 1828(c)(6) (1976); note 47 *supra* and accompanying text.

91. See Austin, *supra* note 11, at 326-27. Justice Harlan, dissenting in *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970), noted that the legality of every merger between two directly competing banks, no matter how small, has been placed in doubt. *Id.* at 374 (Harlan, J., dissenting). *Phillipsburg Nat'l Bank & Trust Co.* involved the merger of two banks in a town with a population of 28,500. Combined, the two banks had only \$38.4 million in deposits. *Id.* at 354-55. Comparatively speaking, the merging banks ranked among the smaller banks of this country. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 306 F. Supp. 645, 647 (D.N.J. 1969), *rev'd*, 399 U.S. 350 (1970). Prior to *Phillipsburg Nat'l Bank & Trust Co.*, the Department of Justice attacked mergers of large banks and left open the issue of whether mergers of small banks in small towns were also subject to the antitrust laws. Austin, *supra* note 11, at 326-27.

92. Austin, *supra* note 11, at 366.

93. *Id.* at 321-26.

94. *Id.* at 326.

95. *Id.* at 363.

96. *Id.* at 368. All this occurs in light of the fact that the courts have not yet specified any numbers to determine anticompetitive concentration levels. On the other hand, industrial cases, unlike bank merger cases, "reveal a complete analysis of the trend as well as the resultant concentration levels exhibited from the merger." *Id.*

97. Act of Dec. 21, 1974, Pub. L. No. 93-528, § 5, 88 Stat. 1706, 1709 (presently codified at 15 U.S.C. § 29(a) (1976)) (amending 15 U.S.C. § 29 (1970)).

the circuit courts before Supreme Court review. This revision stretched the litigation period by approximately two years, thereby increasing the costs of litigation⁹⁸ and further discouraging challenges to the Justice Department's analysis.

In essence, the Justice Department can shape the general guidelines for commercial bank antitrust law by the mere filing of a suit. In light of the extensive time and effort expended in the analysis and evaluation of proposed mergers, the FRB, FDIC and OCC are justifiably dismayed when member banks decide to abandon agency-approved mergers because of the Department of Justice's opposition.⁹⁹ This kind of duplicative effort is unjustifiable, especially during a period of financial austerity.

IV. The Expanding Line of Commerce

A. Judicial Recognition of Banking Changes

At present, the banking agencies generally apply a broad standard when defining the relevant line of commerce.¹⁰⁰ The Supreme Court's definition of the line of commerce, though arguably apropos when first announced in *PNB*, has become anachronistic due to changes in the financial marketplace.¹⁰¹ During the late 1960's and the early 1970's, district courts often expressed a belief that the line of com-

98. Austin, *supra* note 11, at 365.

99. *Id.* at 326.

100. See notes 64-75 *supra* and accompanying text.

101. For a discussion of current changes in the market, see notes 117-89 *infra* and accompanying text.

An outdated regulatory structure, unstable economy, and dramatic changes in the financial marketplace have contributed to the need for revisions of bank merger law. Less regulated institutions are providing new services, "often in direct competition with traditional depository institutions." LaFalce, *Banking in the Eighties*, 37 Bus. Law. 839 (1982). See also Ferrara & Roiter, *Legislative and Market Forces Reshape Financial Services Industry*, Bus. L. MEMO, Mar.-Apr. 1982, at 3 (discussion of the fading distinctions between financial institutions). If all other financial institutions are included in the relevant line of commerce, the percentage participation of commercial banks before and after a merger might become a less substantial statistic. See *United States v. First Nat'l Bank*, 310 F. Supp. 157, 168 (D. Md. 1970) (merger of two banks held not to violate the antitrust laws but in fact tended to satisfy the convenience and needs of the community). However, unlike some lower courts, see notes 103-09 *infra* and accompanying text, the Supreme Court has consistently held that commercial banking constitutes a separate line of commerce "distinguished by a unique clustering of products and services not available at any other type of financial institution" and thus has never upheld a case in which thrift institutions were included in the relevant product market with commercial banks. Bleier & Eisenbeis, *supra* note 14, at 376.

merce was broader than the Supreme Court held it to be,¹⁰² despite contrary contentions by the Department of Justice. In *United States v. Crocker-Anglo National Bank*¹⁰³ and *United States v. Provident National Bank*,¹⁰⁴ the courts accepted an expanded definition of the line of commerce and based their decision, in part, on the fact that the phrase "line of commerce" was omitted from BMA-66.¹⁰⁵ District courts in Idaho,¹⁰⁶ Maryland,¹⁰⁷ New Jersey,¹⁰⁸ and Mississippi¹⁰⁹ expanded the line of commerce due to competition from other institutions providing financial products and services similar to those offered by commercial banks. Thus, while the district courts have often included financial institutions other than banks in the line of commerce, the Supreme Court has consistently limited the relevant market to commercial banks only.¹¹⁰

In 1974, the Supreme Court finally recognized the changing nature of the banking industry. In *United States v. Connecticut National Bank*¹¹¹ (CNB), the Justice Department sought to enjoin a merger between two national banks, the Connecticut National Bank and the First New Haven National Bank, the fourth and eighth largest commercial banks in Connecticut.¹¹² The district court upheld the OCC's decision to approve the merger and concluded that the appropriate line of commerce included both commercial banks and savings

102. In *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970), Justice Harlan noted in his dissent that the influence nonbank financial institutions, like thrifts, have on the product market could be used to rebut the presumption of illegality raised by the percentage-of-concentration figures. He reasoned that since these other financial institutions offer close substitutes for the products and services of commercial banks, they should be included in the line of commerce. *Id.* at 377-82 (Harlan, J., dissenting).

103. 277 F. Supp. 133, 154-57 (N.D. Cal. 1967).

104. 280 F. Supp. 1, 7-8 (E.D. Pa. 1968).

105. Shay & Yingling, *New Approaches to Banks' Product Market Weighed*, *Legal Times of Wash.*, June 22, 1981, at 20, col. 4.

106. *United States v. Idaho First Nat'l Bank*, 315 F. Supp. 261, 267 (D. Idaho 1970) (OCC's decision to approve a proposed merger between two banks in Idaho affirmed because the evidence established that the merger would not substantially lessen competition).

107. *United States v. First Nat'l Bank*, 310 F. Supp. 157, 168 (D. Md. 1970).

108. *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 306 F. Supp. 645, 647 (D.N.J. 1969), *rev'd*, 399 U.S. 350 (1970).

109. *United States v. First Nat'l Bank*, 301 F. Supp. 1161, 1180-81 (S.D. Miss. 1969) (OCC's decision to approve a proposed merger between two banks affirmed because it would not have any adverse or anticompetitive effects).

110. Shay & Yingling, *supra* note 105, at 21, col. 4.

111. 362 F. Supp. 240 (D. Conn. 1973), *vacated*, 418 U.S. 656 (1974).

112. *Id.* at 241. Combined, the two banks would have held 10.3% of the deposits in commercial banks in Connecticut. 418 U.S. at 658.

banks.¹¹³ The Supreme Court reversed the district court's decision, choosing to adhere to the old definition of the line of commerce.¹¹⁴ The Court nevertheless indicated a willingness to expand the old line of commerce definition in an appropriate case.¹¹⁵

B. The Assimilation of Commercial Bank and Thrift Institution Services

In *PNB*, the Court recognized that a significant distinction between commercial banks and thrifts was that commercial banks, unlike other financial institutions, could alone accept demand deposit (checking) accounts.¹¹⁶ Before the *CNB* decision was handed down in 1974, thrift institutions in many of the New England states had already been granted the power to maintain checking or NOW¹¹⁷ ac-

113. 362 F. Supp. at 281. The district court found that meaningful competition existed between commercial and savings banks for personal checking accounts, real estate mortgages, personal loans, and commercial loans. *Id.* at 280.

114. 418 U.S. at 660-66.

115. The Court stated:

We do not say, and *Phillipsburg National Bank . . . and Philadelphia National Bank . . .* do not say, that in a case involving a merger of commercial banks a court may never consider savings banks and commercial banks as operating in the same line of commerce, no matter how similar their services and economic behavior. At some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act. In Connecticut, that point may well be reached when and if savings banks become significant participants in the marketing of bank services to commercial enterprises.

Id. at 666. Thus, the Court's dicta in *CNB* laid the groundwork for a new perspective toward bank mergers, hastened by the expansion of financial services offered by thrifts and other financial institutions.

116. 374 U.S. at 326. "Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services or other financial institutions; the checking account is in this category." *Id.* at 356. Among the other important functions of commercial banks are the creation of additional money and credit, management of the checking account system, and furnishing of short-term business loans. *Id.* at 326-27. For a list of banking products, see *id.* at 326 n.5. For a discussion of what distinguishes a commercial bank from a savings and loan association, see Alcorn, *Phillipsburg and Beyond—Developing Trends in Substantive Standards for Bank Mergers*, 9 Hous. L. Rev. 417, 418 (1972).

117. "NOW" is an acronym for "negotiable order of withdrawal." Pfeiler, *Nationwide NOW Accounts: Current Legal Issues, Supervisory Update*, 14 AKRON L. REV. 397, 397 (1980-81). NOW accounts allow depositors to draw negotiable drafts, payable to a third party, against deposits they have made into interest-bearing accounts. D. CRANE & M. RILEY, *NOW ACCOUNTS 1* (1978). NOW accounts are intended to be the savings bank's equivalent of a commercial bank's checking accounts. Thus, no passbook is issued to the depositor. See *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 434-35, 343 N.E.2d 735, 737, 381 N.Y.S.2d 17, 19

counts. Initially, the right to provide these services was granted only to state-chartered depository institutions in Massachusetts¹¹⁸ and New Hampshire¹¹⁹ in 1972.¹²⁰ In 1973, Congress authorized all federally-chartered institutions, with the exception of credit unions, in these two states to offer NOW accounts.¹²¹ The popularity of this innovation prompted other New England states to authorize their state-chartered financial institutions to offer checking accounts.¹²² In 1976, Congress authorized the federally-chartered financial institutions in the remaining New England states to maintain NOW accounts¹²³ in order to insure competitive equality.¹²⁴

By statutory amendment, thrifts in New York acquired the power to hold NOW accounts in 1976. In 1974, the New York Superintendent of Banks, pursuant to section 238(6) of the Banking Law,¹²⁵ issued Regulation 301.1¹²⁶ which permitted savings banks and savings and

(1975) (discussed at notes 125-27 *infra* and accompanying text), *modified*, 38 N.Y.2d 953, 347 N.E.2d 923, 383 N.Y.S.2d 597 (1976).

NOWs are generally deposited for collection by the payee or transferee in his own bank and are presented, via a commercial bank by arrangement with the drawee savings bank, to the drawee savings bank for payment. The depositor's NOW account is then charged to pay the order. As with a commercial bank, a monthly statement is furnished to the depositor by the savings bank. *Id.* at 435, 343 N.E.2d at 737, 381 N.Y.S.2d at 19.

118. *See* *Consumer Sav. Bank v. Commissioner of Banks*, 361 Mass. 717, 718, 282 N.E.2d 416, 417 (1972) (holding that savings banks in Massachusetts could offer NOW accounts).

119. *See* *New Hampshire Bankers Ass'n v. Nelson*, 113 N.H. 127, 128, 302 A.2d 810, 811 (1973) (letter by State Banking Commissioner on Oct. 26, 1972, stating that a savings bank may offer NOW accounts).

120. SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980, S. REP. NO. 368, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 236, 243 (Senate Report accompanying the Depository Institutions Deregulatory and Monetary Control Act of 1980, discussed at notes 133-37 *infra* and accompanying text).

121. Act of Aug. 16, 1973, Pub. L. No. 93-100, §§ 2(a)-2(b), 87 Stat. 342.

122. *See, e.g.*, CONN. GEN. STAT. §§ 36-104b to 36-104d, 36-104f to 36-104m, 36-182a (1981) (authorization of NOW accounts); ME. REV. STAT. ANN. tit. 9-B, §§ 423, 521, 721 (1980) (authorization of demand deposit accounts). *See* SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980, S. REP. NO. 368, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 236, 243.

123. Act of Feb. 27, 1976, Pub. L. No. 94-222, § 2, 90 Stat. 197; SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980, S. REP. NO. 368, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 236, 243.

124. *See* SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980, S. REP. NO. 368, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 236, 243.

125. N.Y. BANKING LAW § 238(6) (McKinney 1971).

126. [1974] 3 N.Y.C.R.R. pt. 301.

loan associations to offer checking accounts to their customers. The New York State Bankers Association (NYSBA), representing most of the commercial banks in New York, opposed the Superintendent's action and filed suit.¹²⁷ Although the NYSBA was victorious, its success was short-lived. In 1976, the New York State Legislature amended section 238(6) to allow savings banks to offer NOW accounts.¹²⁸ In 1978, federally-chartered depository institutions in New York were authorized by Congress to offer NOW accounts.¹²⁹

Until 1980, thrifts could not accept NOW accounts unless they were situated in either New England,¹³⁰ New York¹³¹ or New Jersey.¹³² This was changed with the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980¹³³ (1980 Act). Under title three¹³⁴ of the 1980 Act, the Consumer Checking Equity Act of 1980, the power to accept NOW accounts was extended to all federally-chartered thrifts.¹³⁵ Credit unions were also granted the power to hold quasi-checking accounts. These accounts are referred to as share draft accounts and function in the same manner as NOW accounts.¹³⁶

127. In *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975), *modified*, 38 N.Y.2d 953, 347 N.E.2d 923, 383 N.Y.S.2d 597 (1976), the New York Court of Appeals ruled in favor of the NYSBA. The court held that the Superintendent was not empowered under § 238(6) to issue regulations allowing savings banks to offer checking accounts. However, because these checking accounts had been offered since 1974 and were in wide use, the court refused to terminate them until March, 1976, so that additional legislation could be enacted to remedy the situation. *Id.* at 441, 343 N.E.2d at 741, 381 N.Y.S.2d at 23.

128. See N.Y. BANKING LAW § 238(6) (McKinney Supp. 1982-1983).

129. See Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 1301, 92 Stat. 3641, 3712; SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980, S. REP. NO. 368, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 236, 243.

130. SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980, S. REP. NO. 368, 96th Cong., 2d Sess. 5, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 236, 240.

131. *Id.*

132. In 1979, state-chartered savings and loan associations in New Jersey acquired the power to offer checking accounts via statutory amendment. See 1979 N.J. Sess. Law Serv. ch. 258, § 1(17) (West) (presently codified at N.J. STAT. ANN. § 17:12B-48(17) (West Supp. 1982-1983)).

133. Pub. L. No. 96-221, 94 Stat. 132 (1980).

134. Pub. L. No. 96-221, §§ 301-313, 94 Stat. 145-51 (1980).

135. SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT OF 1980, S. REP. NO. 368, 96th Cong., 2d Sess. 7, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 236, 242.

136. *Id.* at 8-9, 1980 U.S. CODE CONG. & AD. NEWS at 244.

The 1980 Act broadens the asset and liability powers of thrifts.¹³⁷ Hence, it significantly narrows the distinctions among the powers and services of thrifts and commercial banks, and expands the relevant line of commerce. The 1980 Act negates one of the fundamental premises for maintaining a narrower definition of the line of commerce—the commercial bank monopoly on checking accounts.¹³⁸ This represents another step towards the continuing erosion of distinctions between banks and other financial institutions.¹³⁹ For the present, the 1980 Act's symbolic effects may outweigh its quantitative impact,¹⁴⁰ but it should force the courts and the Department of Justice to take a fresh look at the line of commerce issue.¹⁴¹

Other factors in the market are eroding the basis upon which the old line of commerce definition was predicated as well. For example, in response to the recent series of savings bank failures,¹⁴² statutes that

137. Some of the powers granted to thrifts under the 1980 Act are: (1) the establishment of nationwide NOW accounts at federally insured depository institutions (§ 303); (2) the establishment of remote service units at all federally insured savings and loan associations (S & Ls) (§ 304); (3) the granting of commercial, real estate and consumer loans by federal S & Ls up to 20% of their assets (§ 401); (4) the investment in commercial paper by federal S & Ls up to 20% of their assets (§ 401); (5) the issuance of credit cards by federal S & Ls (§ 402); (6) the granting of trust powers to federal S & Ls (§ 403); (7) the granting of commercial, corporate, and business loans by federal mutual savings banks up to 5% of their assets (§ 408(a)); and (8) the acceptance by federal mutual savings banks of demand deposits in connection with a commercial, corporate, or business loan relationship (§ 408(b)). Pub. L. No. 96-221, §§ 303-304, 401-403, 408, 94 Stat. 146, 151-57, 160 (1980).

138. In 1974, the Supreme Court noted that a savings bank's ability to offer checking accounts would increase the degree of competition between savings and commercial banks because "demand deposits have traditionally been a unique attribute of the latter institutions." *Connecticut Nat'l Bank*, 418 U.S. at 665.

139. In *United States v. First Nat'l State Bancorp.*, 499 F. Supp. 793 (D.N.J. 1980), the court remarked:

Commercial banks face competition with respect to most of the financial services they offer In . . . New Jersey, mutual savings banks and savings and loan associations ("thrifts") offer essentially the same services to the locally-limited retail customers as do commercial banks Moreover, the recently enacted Depository Institutions Deregulation and Monetary Control Act of 1980 . . . insures the elimination of any remaining distinctions between thrifts and commercial banks with respect to retail financial services provided to the locally-limited customer.

Id. at 800 (footnotes omitted, emphasis added).

140. Bleier & Eisenbeis, *supra* note 14, at 383.

141. The expansion of the definition of the line of commerce can alter the evaluation of the competitive effects of a proposed merger under the antitrust laws. It can, for example, extend the range of permissible acquisitions that would otherwise have been prohibited under the present line of commerce definition. *Id.* at 375.

142. For the first eight months of 1981, S & Ls had a net cash outflow of \$20 billion, as compared to a net cash inflow of \$5 billion in 1980. During this same

will ease merger and branching restrictions for these institutions have been proposed.¹⁴³ One of these proposals, the Garn-St. Germain Depository Institutions Act of 1982,¹⁴⁴ was recently passed by Congress¹⁴⁵ and signed into law by President Reagan.¹⁴⁶ The key provisions of this legislation include giving regulators the power to approve mergers of ailing institutions across state lines¹⁴⁷ and expanding thrift asset powers by permitting them to make commercial and other non-mortgage loans¹⁴⁸ using up to ten percent of their total assets.¹⁴⁹

period, 80 % of this Nation's S & Ls operated at a loss. In 1981, Congress recognized that at least 300 out of the 3840 S & Ls were in serious financial trouble. For the period ending on October 1, 1981, mutual savings banks suffered losses in 27 out of 30 months. 127 CONG. REC. H7801 (daily ed. Oct. 27, 1981) (statement of Rep. Moffet). For the last half of 1981, losses at the Nation's 3217 federally insured S & Ls reached a record \$3.1 billion. N.Y. Times, Apr. 6, 1982, at D1, col. 1. The 34 savings banks in New York City alone lost \$337 million during the fourth quarter of 1981. *Id.* Mar. 1, 1982, at D1, col. 3.

Throughout 1981 and 1982, newspapers reported that thrifts were failing and in need of either new sources of capital or merger partners. *See, e.g.*, Wall St. J., Oct. 29, 1981, at 2, col. 3 (Greenwich Savings Bank); N.Y. Times, Apr. 15, 1982, at D1, col. 1 (Fidelity Savings and Loan Ass'n). These losses are attributable to high interest rates. While other financial intermediaries, like mutual funds, were offering investments at current market rates, savings banks were paying a mere 5½ % on time deposits. This caused an exodus from the thrifts to the higher yield money market instruments. Thrifts cannot match these rates due to the low rates they earn on outstanding mortgages. *Id.*, Nov. 3, 1981, at D2, col. 1. Hence, these thrifts no longer have a cash base from which to make new loans at current interest rates and are left with mortgages dating back to the 1960's, when interest rates were lower. *See id.*, Jan. 4, 1983, at A1, col. 3.

143. *See, e.g.*, S. 2531 and S. 2532, 97th Cong., 2d Sess., 128 CONG. REC. S5308-18 (daily ed. May 13, 1982); H.R. 4603, 97th Cong., 1st Sess., 127 CONG. REC. H7801-02 (daily ed. Oct. 27, 1981), 127 CONG. REC. H7838-42 (daily ed. Oct. 28, 1981); S. 1720, 97th Cong., 1st Sess., 127 CONG. REC. S11, 254-76 (daily ed. Oct. 7, 1981).

144. Pub. L. No. 97-320, 96 Stat. 1469 (1982).

145. *See* 128 CONG. REC. S12,709-11 (daily ed. Sept. 30, 1982) (Senate); 128 CONG. REC. H8431-39 (daily ed. Oct. 1, 1982) (House); *Congress Passes Depository Institutions Amendments Bill*, FED. BANKING L. REP. (CCH) No. 940, at 1 (Oct. 8, 1982).

146. 18 WEEKLY COMP. PRES. DOC. 1319-20 (Oct. 18, 1982); N.Y. Times, Oct. 18, 1982, at D1, col. 3.

147. Pub. L. No. 97-320, § 116, 96 Stat. 1469, 1476-79 (1982); S. REP. No. 641, 97th Cong., 2d Sess. 9-12 (1982) (Senate Conference Report on the Garn-St. Germain Depository Institutions Act of 1982).

148. Pub. L. No. 97-320, § 325, 96 Stat. 1500 (1982); S. REP. No. 641, 97th Cong., 2d Sess. 34 (1982); *Congress Clears Way for Passage of Financial Reform Legislation*, 39 WASH. FIN. REP. (BNA) 600, 601 (Oct. 4, 1982).

149. Pub. L. No. 97-320, § 325, 96 Stat. 1500 (1982); S. REP. No. 641, 97th Cong., 2d Sess. 34 (1982); N.Y. Times, Oct. 4, 1982, at D1, col. 3.

The Federal Home Loan Bank Board (FHLBB) has proposed broader powers for federally-chartered savings and loan associations (S & Ls) which would allow these thrifts to become more competitive with commercial banks and other financial institutions.¹⁵⁰ In addition, the FHLBB, with the support of the Justice Department, has proposed a rule easing the restrictions on supervised interstate acquisitions of failing S & Ls.¹⁵¹

These grants of new powers, some of which were traditionally granted to commercial banks alone, will increase markedly the competition between thrifts and commercial banks. The more aggressive and stronger thrifts are taking advantage of these laws to further strengthen their position in the marketplace and to increase their market shares.¹⁵² Aggressive thrifts may account for the fact that commercial banks in New Jersey held only 51.8% of the total deposits in that state's depository institutions in 1980.¹⁵³

A direct result of more liberal merger and branching restrictions on thrifts is the emergence of the First Interstate Banking Corporation, a tri-state savings institution doing business in California, New York and Florida.¹⁵⁴ This combination,¹⁵⁵ the first federally supervised interstate merger, was consummated on September 4, 1981.¹⁵⁶ In a similar transaction, the Federal Savings and Loan Insurance Corporation (FSLIC) gave the California Federal Savings and Loan Association of Los Angeles permission to cross state lines and acquire four institutions in Florida and Georgia.¹⁵⁷

150. See 47 Fed. Reg. 8204 (1982); N.Y. Times, Feb. 26, 1982, at D3, col. 1.

151. See 47 Fed. Reg. 17,999 (1982); *Justice Urges FHLBB to Drop Restrictions on Interstate Branching in Supervisory Mergers*, [Jan.-June] WASH. FIN. REP. (BNA) No. 24, at A-18 (June 14, 1982); *NSLL Applauds FHLBB Proposed Rule on Interstate Branching*, 39 WASH. FIN. REP. (BNA) 5 (July 5, 1982).

152. One aggressive thrift, the Buffalo Savings Bank, under the direction of its president, Ross B. Kenzie, has been actively seeking to acquire troubled thrift institutions. N.Y. Times, Feb. 23, 1982, at D1, col. 3. Thus far, Buffalo Savings has purchased the Union Dime Savings Bank, the New York Bank for Savings, and the Western New York Savings Bank. See *id.*, Apr. 4, 1982, § 3, at 1, col. 2; *id.*, Mar. 24, 1982, at A1, col. 6; *id.*, Jan. 16, 1982, at 41, col. 5.

153. See *First Nat'l State Bancorp.*, 499 F. Supp. at 800.

154. N.Y. Times, Jan. 4, 1982, at D1, col. 3.

155. The merger involved the Washington Savings and Loan Association of Florida, the West Side Federal Savings and Loan Association of New York, and the Citizens Savings and Loan Association of San Francisco. *Id.*

156. FHLBB Res. Nos. 81-523, 81-526 & 81-497, noted in Leibold, *Mergers of FSLIC Insured Savings and Loan Associations*, 37 Bus. LAW. 868, 872 n.21 (1982).

157. N.Y. Times, Feb. 6, 1982, at 39, col. 5.

C. Increasing Competition from Other Financial Intermediaries

1. Money Market Funds

If the proposed deregulation of the financial services industry becomes a reality,¹⁵⁸ commercial banks can expect fierce competition for deposits from investment banks.¹⁵⁹ Many investment companies are already sponsoring money market funds with check writing privileges.¹⁶⁰ A money market fund¹⁶¹ allows investors to trade through a

158. See notes 182-85 *infra* and accompanying text.

159. The separation of banking from the securities business has been a fundamental tenet underlying the banking system ever since the passage of §§ 5(c), 16, 20 & 21 of the Glass-Steagall Act, 12 U.S.C. §§ 24,335, 337 & 378(a) (1976) (the Act). The purpose of the Act was to prohibit commercial banks from going into the investment banking business. 77 CONG. REC. 3725, 3730 (1933) (statement by Senator Glass during debate on Senate version of what later became the Glass-Steagall Act). See also *id.* at 3835 (debate in the House of Representatives). Although many believed that it was improper to engage in commercial and investment banking simultaneously, banks began establishing securities affiliates in 1908. *A Resolution to Make a Complete Survey of the National and Federal Reserve Banking Systems, 1931: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1052 (1931) [hereinafter cited as *1931 Hearings*]; *Investment Co. Inst. v. Camp*, 401 U.S. 617, 629 (1971). These affiliates were still in existence at the time of the passage of the Act. Congress endeavored to abolish these affiliates because the failure of the Bank of the United States in 1930 was widely attributed to that bank's transactions with its many securities affiliates. See *1931 Hearings, supra*, at 116-17, 1017 & 1068. Congress believed that commercial banks opened themselves up to financial dangers and risks when they participated in the trading and ownership of speculative securities. C. GLASS, OPERATION OF THE NATIONAL AND FEDERAL RESERVE BANKING SYSTEMS, S. REP. NO. 77, 73d Cong., 1st Sess. 6, 8, 10 (1933).

160. Edwards, *Banks and Securities Activities: Legal and Economic Perspectives on the Glass-Steagall Act*, in *THE DEREGULATION OF THE BANKING AND SECURITIES INDUSTRIES* 273, 274 (L. Goldberg & L. White eds. 1979). Money market funds are managed and sponsored by a separate company that acts as the fund's advisor. See R. EDMISTER, FINANCIAL INSTITUTIONS MARKETS AND MANAGEMENT 212-13 (1980). See also *Galfand v. Chestnutt Corp.*, 545 F.2d 807, 808 (2d Cir. 1976), *cert. denied*, 435 U.S. 943 (1978) (mutual fund investment advisor liable for breach of fiduciary duty because it acquired from the mutual fund a patently one-sided revision of advisory contract increasing the expense ratio limitation); *Markowitz v. Brody*, 90 F.R.D. 542, 553 (S.D.N.Y. 1981) (shareholder derivative suit against a mutual fund, its directors, investment advisors, and principal underwriter, alleging a breach of fiduciary duty due to excessive advisory fees dismissed as plaintiffs failed to meet criteria for bringing derivative suits under the Investment Company Act); Note, *Termination of Section 36(b) Actions by Mutual Fund Directors: Are the Watchdogs Still the Shareholders' Best Friends?*, 50 FORDHAM L. REV. 720, 720-21 (1982).

161. A money market fund is a species of a mutual fund. N.Y. Times, Feb. 14, 1980, at D13, col. 4. See R. EDMISTER, *supra* note 160, at 211. A money market fund is a portfolio of short-term, prime-grade securities, such as certificates of deposit, Treasury bills, and commercial paper. *Id.*

mutual fund.¹⁶² The capital in the money market fund is invested in short-term debt securities.¹⁶³ As a result, these investment companies give the small saver an opportunity to invest indirectly in a diversified portfolio of short-term, large denomination money market instruments¹⁶⁴ which often have a much higher return than banks can offer on deposits.¹⁶⁵

These money market funds have been successful in diverting a large amount of money from the traditional depository institutions.¹⁶⁶ Since their inception in the early 1970's,¹⁶⁷ the money market funds have grown rapidly. As of December 19, 1979, there were forty-two money market funds¹⁶⁸ with assets of \$100 million or more that were available to individual investors. As of October 6, 1982, there were over 100 such money market funds.¹⁶⁹ The funds had total assets of about \$180 billion at the end of 1981.¹⁷⁰

162. A mutual fund is an open-end investment company. SECURITIES AND EXCHANGE COMMISSION, PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, H.R. REP. NO. 2337, 89th Cong., 2d Sess. 43 (1966). An open-end investment company can offer for sale any redeemable security that it issues. "Redeemable" means that the issuer is legally obligated to repurchase the security for the value of the issuer's net assets that the security represents. Note, *The Mutual Fund Industry: A Legal Survey*, 44 NOTRE DAME LAW. 732, 742-43 (1969). The goal of a mutual fund is to achieve investment efficiency by pooling the resources of its shareholders. See *Tannenbaum v. Zeller*, 552 F.2d 402, 405 (2d Cir.), *cert. denied*, 434 U.S. 934 (1977); Note, *supra* note 160, at 720 n.7.

163. R. EDMISTER, *supra* note 160, at 211; N.Y. Times, Feb. 14, 1980, at D13, col. 4. See also *First Multifund for Daily Income v. United States*, 602 F.2d 332, 334 (Ct. Cl. 1979) (open-end registered investment company which resells redeemed shares of its stock that had been sold under a previous registration statement filed with the Securities and Exchange Commission is required to file a new registration statement covering such shares), *cert. denied*, 445 U.S. 916 (1980). Typical investments include short-term United States government securities, government agency securities, bank certificates and bankers acceptances. See Note, *supra* note 160, at 720 n.2.

164. 68 Fed. Res. Bull. 174, 175 (Mar. 1982) (statement by Lyle E. Gramley, Member, Board of Governors of the Federal Reserve System, before the Subcommittee on Domestic Monetary Policy of the Committee on Banking, Finance, and Urban Affairs, U.S. House of Representatives, March 3, 1982).

165. The major reason for their popularity is that money market funds, unlike bank deposits, do not have a ceiling as to the rate of interest investors can earn. See Axilrod, *Monetary Policy, Money Supply, and the Federal Reserve's Operating Procedures*, 68 Fed. Res. Bull. 13, 17 (Jan. 1982).

166. For example, while sources of funds to credit markets from check deposits exhibited an unstable trend between 1976 and 1981, contributions from money market fund shares rose from an insignificant amount to \$107.5 billion. 68 Fed. Res. Bull. A45 (Aug. 1982).

167. D. DARST, *HANDBOOK OF THE BOND AND MONEY MARKETS* 298 (1981).

168. N.Y. Times, Dec. 21, 1979, at D6, col. 6.

169. *Id.*, Oct. 8, 1982, at D10, col. 5.

170. Axilrod, *supra* note 165, at 17 n.10.

The two largest money market funds are managed by Merrill Lynch, Pierce, Fenner & Smith, Inc.¹⁷¹ One of these funds is the Cash Management Account¹⁷² (CMA). An attractive feature of this program is that the investor receives a checking account with Bank One of Columbus, Ohio.¹⁷³ Thus, the CMA has the advantage of offering high returns on money market funds while allowing the investor to have immediate access to his funds by drawing on the CMA as if it were a checking account. CMA customers receive a monthly statement, similar to a regular checking account statement, detailing all CMA transactions.¹⁷⁴

Merrill Lynch's CMA program, especially its checking account feature, has elicited vigorous objections from the commercial banking industry.¹⁷⁵ For example, bankers in Utah lobbied for legislation to place Merrill Lynch and other firms like it under the control of that state's banking department.¹⁷⁶ However, Merrill Lynch and its allies in the securities industry succeeded in thwarting the proposal.¹⁷⁷ In Tennessee, an issue arose over whether the CMA program violated that state's banking laws. The Attorney General of Tennessee determined that Merrill Lynch's CMA program did not constitute unlawful banking in violation of that state's statutes.¹⁷⁸ Although Merrill

171. As of October 6, 1982, the Merrill Lynch Cash Management Account (CMA) Money Fund had over \$15.5 billion in assets and ranked second only to the Merrill Lynch Ready Assets account (over \$22.5 billion) in size. N.Y. Times, Oct. 8, 1982, at D10, col. 5. Ironically, the idea for Merrill Lynch's CMA program originated in 1975 and is traced to Donald Regan, then Chairman of the Board at Merrill Lynch, who later outlined the Reagan Administration's proposal to deregulate the financial services industry. See *Fingfeld v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 78 Civ. 5987, slip op. at 6-7 (S.D.N.Y. Sept. 24, 1981) (plaintiff's claim that defendant misappropriated his business idea for the CMA program dismissed and defendant's motion for summary judgment granted); notes 182-85 *infra* and accompanying text.

172. The CMA is a three component financial program. It consists of a Merrill Lynch securities margin account, a no-load money market mutual fund, and a Visa credit card account maintained by a bank in Ohio. MERRILL LYNCH CASH MANAGEMENT ACCOUNT PROGRAM, PROSPECTUS i (July 29, 1982); *Fingfeld*, slip op. at 5.

173. When a CMA check is drawn, it is paid and cleared by Bank One, which notifies Merrill Lynch. Merrill Lynch then pays the amount of the check out of any cash in the investor's CMA which has not yet been invested in money market fund shares. If there is insufficient cash available, Merrill Lynch then sells an appropriate number of shares of the investor's CMA holdings to cover the balance. PROSPECTUS, *supra* note 172, at iii-iv.

174. *Id.* at iv.

175. Cole, *The National Bank of Merrill Lynch*, N.Y. Times, Feb. 7, 1982, § 3, at 1, col. 2.

176. *Id.*

177. *Id.*

178. Money Market Fund Account, 10A Op. Tenn. Att'y Gen. 538, 540 (1981). In Oregon, the Justice Department found that the CMA program did not constitute

Lynch's CMA program has not yet been held to fall within any state's definition of banking, it does directly compete with commercial banks.

2. Deregulation

Recently, commercial banks have been trying to enter the securities industry.¹⁷⁹ The deregulation of the banking industry¹⁸⁰ may hasten rather than delay a reevaluation of the line of commerce issue by the Justice Department if small commercial banks find it impossible to compete with the increasing array of services offered by larger commercial banks and other financial institutions. On January 7, 1983, Bankamerica Corporation, the holding company for the Bank of America, the largest commercial bank in the United States, received approval from the FRB to acquire Charles Schwab Corporation, a discount securities firm.¹⁸¹ On February 4, 1982, Treasury Secretary Donald Regan outlined the Reagan Administration's proposal for deregulating financial services institutions.¹⁸² The proposal would allow bank holding companies to engage in various underwriting activities by acquiring a securities affiliate.¹⁸³ In addition, the deregulation

banking under that state's statutes. Op. U.S. Att'y Gen. No. 8100 (Feb. 11, 1982). In addition, pursuant to an agreement between the Colorado State Banking Commissioner and Merrill Lynch, customers in Colorado who subscribe to the CMA program can draw checks only in amounts of \$200 or more. PROSPECTUS, *supra* note 172, at v.

179. One commentator in support of these efforts states that "[i]f nondepository institutions are to be allowed to compete with banks in functions long associated with depository institutions, then . . . certain depository institutions should be permitted to compete in areas long associated with the securities industry." LaFalce, *supra* note 101, at 846.

180. See BUS. WK., May 31, 1982, at 68; *id.*, Apr. 5, 1982, at 30; WALL ST. J., Mar. 9, 1982, at 30, col. 1; *id.*, Feb. 12, 1982, at 28, col. 1; BARRONS, Dec. 14, 1981, at 30, col. 1; WALL ST. J., Oct. 16, 1981, at 2, col. 2.

181. FED. BANKING L. REP. (CCH) No. 954, at 1 (Jan. 14, 1983); WALL ST. J., Jan. 10, 1983, at 4, col. 1; N.Y. TIMES, Jan. 8, 1983, at 1, col. 4. The Justice Department raised no objections to the proposed takeover. *Bankamerica Takeover of Charles Schwab Securities Firm No Problem for Justice*, [Jan.-June] WASH. FIN. REP. (BNA) No. 23, at B-1 (June 7, 1982). The Justice Department's acquiescence may have been in deference to the Reagan Administration's desire to deregulate the financial services industry. See notes 182-85 *infra* and accompanying text.

182. N.Y. TIMES, Feb. 5, 1982, at D10, col. 6. On June 24, 1982, Representative Stanton introduced the Bank Holding Company Deregulation Act of 1982, H.R. 6720, in the House of Representatives on behalf of the Reagan Administration. See H.R. 6720, 97th Cong., 2d Sess., 128 CONG. REC. H3969 (daily ed. June 24, 1982). As a result, securities firms are considering entry into the banking industry, since they view banking as potential earnings havens. Edwards, *supra* note 160, at 274.

183. N.Y. TIMES, Feb. 5, 1982, at D10, col. 6.

would broaden the ability of bank holding companies to enter new lines of commerce, such as real estate development and insurance.¹⁸⁴ The proposal, if adopted, may gradually reduce the distinction between the banking and securities industries.¹⁸⁵ On November 15, 1982, all commercial banks and thrift institutions were authorized to offer money market funds.¹⁸⁶ The increasing interaction between the securities and the banking industries will continue to erode the traditional definition of the line of commerce with respect to bank mergers.

3. *Non-Traditional Competitors*

Other industries are encroaching into services traditionally supplied by commercial banks as well. Sears Roebuck and Company, J.C. Penney Company, Inc. and Montgomery Ward and Company are offering consumer loans, once the private preserve of commercial banks,¹⁸⁷ to their retail customers.¹⁸⁸ In addition, American Express Company and The Prudential Insurance Company of America are offering limited banking services.¹⁸⁹ Unlike commercial banks, these other industries are not subject to myriad banking laws and regulations. The McFadden Act,¹⁹⁰ for example, restricts the interstate branching activities of commercial banks,¹⁹¹ but no such interstate

184. *Id.*

185. *Id.*

186. 47 Fed. Reg. 53,710, 53,716 (1982). The regulation authorizing these accounts became effective on December 14, 1982. *Id.* at 53,711.

187. Lowy, *A Tale of Two Antitrust Rulings: Defining Thrift Institutions*, Nat'l L.J., May 17, 1982, at 16, col. 1, 3. In addition, Sears Roebuck has acquired Dean Witter Reynolds, an investment bank, which offers money market funds. *See* Cole, *supra* note 175, at 1, col. 4; N.Y. Times, Oct. 8, 1982, at D10, col. 4.

188. Lowy, *supra* note 187, at 16, col. 1, 3.

189. Cole, *supra* note 175, at 1, col. 4; Ferrara & Roiter, *supra* note 93, at 3. American Express and Prudential Insurance have achieved this via cross-industry acquisitions. *See id.* at 3. Prudential bought Bache, Halsey, Stuart and American Express acquired Shearson, Loeb, Rhoades. Cole, *supra* note 175, at 1, col. 4. Both Bache and Shearson offer money market funds. N.Y. Times, Oct. 8, 1982, at D10, col. 5.

This trend has been exhibited by companies completely outside the financial services industry. For instance, McMahon Furniture Stores, a retail furniture chain located in Carlsbad, California, has applied for a national bank charter in that state. *See* [Jan.-June] WASH. FIN. REP. (BNA) No. 25, at A-25 (June 21, 1982).

190. Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1224, 1228-29 (initially amended by Banking Act of 1933, ch. 89, § 23, 48 Stat. 162, 189-90) (presently codified as amended at 12 U.S.C. §§ 36(c)-36(d) (1976)).

191. Section (c) of the McFadden Act specifically limits the branching activities of national banks to the state in which that bank is situated. *See* 12 U.S.C. § 36(c) (1976).

restrictions are placed on other industries. Thus, it is conceivable that corporate conglomerates like Sears Roebuck and Company may engage in some form of interstate banking before commercial banks ever acquire that power. This would afford these institutions a significant competitive advantage over commercial banks.

Undoubtedly, other nonbanking institutions, both financial and nonfinancial, are having a direct competitive impact on commercial banks. The increasing encroachment on the commercial banking industry by thrifts and other corporations has served to eliminate the notion that commercial banks provide a unique cluster of products and services. As a result, the old definition of the line of commerce as announced in *PNB* requires expansion. Although in the past the Department of Justice did not recognize these changes in the product market when applying the antitrust laws to bank mergers, it must do so now in light of new merger guidelines.¹⁹² These new guidelines require a greater in-depth analysis of the relevant product market. In addition, because bank regulatory agencies have had more experience in identifying the recent permutations which have occurred in the financial services industry, a greater interaction between the Department of Justice and the regulators when reviewing proposed bank mergers is imperative.

D. The 1982 Merger Guidelines

The 1982 merger guidelines¹⁹³ replace those issued in 1968.¹⁹⁴ The 1968 merger guidelines were based on the "numbers game" methodology.¹⁹⁵ Unlike the 1968 guidelines, the new guidelines draw heavily on

192. See notes 193-94 *infra* and accompanying text.

193. Dept. of Justice Press Release, New Merger Guidelines (June 14, 1982) (statement of Attorney General William French Smith, at 1).

194. *Id.* New economic thinking and new judicial attitudes and decisions rendered the 1968 guidelines obsolete. *Id.* at 2.

195. Baker, *Justice Dept. Merger Guidelines Contribute a Dose of Rationality*, Nat'l L.J., June 28, 1982, at 16, col. 1. In considering whether a proposed merger violated § 7 of the Clayton Act under the 1968 guidelines, the Supreme Court had to determine: (1) what percent of the market the new bank would possess, and (2) the overall concentration of the market. Comment, *supra* note 38, at 771. Justice Harlan vehemently disagreed with this approach by the Supreme Court on at least three occasions. See, e.g., *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. at 376-77 (Harlan, J., dissenting); *United States v. Third Nat'l Bank*, 390 U.S. at 193 (Harlan, J., dissenting); *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. at 673 (Harlan, J., dissenting). The Supreme Court's use of such a test appears to go against its prior decision in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), which stated "that a merger had to be functionally viewed, in the context of its particular industry." *Id.* at 321-22 (footnote omitted).

new economic thinking and contribute economic rationality to the merger enforcement process.¹⁹⁶ Some commentators have suggested that in *PNB* and *Phillipsburg National Bank*, the Supreme Court did not consider economic reality when it made a judicial determination of the concentration ratio.¹⁹⁷ These commentators have noted that the Supreme Court avoids extensive economic analysis whenever a simpler approach permits a more vigorous antitrust policy.¹⁹⁸

The old guidelines measured market shares using the four-firm concentration ratio, which is the sum of the percentage market shares of the top four firms in the market.¹⁹⁹ The new guidelines utilize the Herfindahl index, which is the sum of the squares of the percentage market share of each firm in the market.²⁰⁰ The Department of Justice then compares the Herfindahl index after the merger with the index prior to the merger.²⁰¹

The 1982 guidelines also place a much greater emphasis on the definition of the relevant product market.²⁰² This may be the most significant departure from the 1968 guidelines.²⁰³ Under the new

196. Baker, *supra* note 195, at col. 1. "The purpose of the new guidelines is to reflect the current emphasis . . . on the need for *economic* evidence of harm or potential harm to competition before a merger will be challenged." Dep't of Justice Press Release, New Merger Guidelines (June 14, 1982) (Press Release at 4) (emphasis added).

197. See Whitesell & Kamens, *supra* note 24, at 754. Under the 1968 merger guidelines, the concentration ratio was measured by the sum of the percentage shares of the four largest firms in the market. Dep't of Justice Release, 1968 Merger Guidelines, at 9 (May 30, 1968).

198. See M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 318 (1964); Whitesell & Kamens, *supra* note 24, at 755 n.23.

199. Dep't of Justice Release, 1968 Merger Guidelines, at 9 (May 30, 1968); Dep't of Justice Press Release, New Merger Guidelines (June 14, 1982) (Press Release at 5).

200. Dep't of Justice Press Release, New Merger Guidelines (June 14, 1982) (Press Release at 5).

201. *Id.* at 6. When the Herfindahl index after the merger is below 1,000, the market is deemed to be unconcentrated and a challenge by the Justice Department is unlikely. If the index falls between 1,000 and 1,800, the market is moderately concentrated and a challenge is still unlikely, provided the merger increases the index by less than 100 points. If the change is greater than 100 points, a challenge by the Justice Department is more likely. If the index is above 1,800, the market is considered highly concentrated. A challenge is unlikely if the merger produces an increase in the index of less than 50 points. If the increase is between 50 and 100 points, a challenge is more likely than not. If the increase is more than 100 points, then a challenge is likely. *Id.* at 8-9. For example, the Herfindahl index in *PNB* would have been 1,337 with an increase of 618 points. In *Phillipsburg Nat'l Bank*, the Herfindahl index would have been 2,677, with an increase of 269 points. Baker, *supra* note 195, at col. 2.

202. N.Y. Times, Apr. 2, 1982, at D1, col. 1.

203. Baker, *supra* note 195, col. 2. The 1968 Merger Guidelines did not provide for an in-depth analysis of the line of commerce. For example, the old guidelines, unlike those recently issued, did not provide for an analysis of the substitutability of

guidelines, the Justice Department will seek to identify all the firms whose cooperation would be necessary to raise and *maintain* prices above the competitive level.²⁰⁴ For example, when considering whether to include a particular product or firm in the market, it may be helpful to hypothesize a small increase in price, and then consider whether such action is likely to cause customers to shift to a different supplier or a different product. If a sufficient number of customers do shift to a substitute product or to an alternative supplier, such an attempt to raise prices would not prove profitable and the market would prove to have been too narrowly defined.²⁰⁵ Thus, the Justice Department will take the product of the merging firms to establish a provisional market and include other products which the merging firm's customers view as adequate substitutes at prevailing prices.²⁰⁶ With the new emphasis on analyzing product substitutability, the Justice Department will be required to weigh the following factors:

- (1) Evidence of buyers' perceptions that the products are or are not substitutes, particularly if those buyers have shifted purchases between the products in response to changes in relative price or other competitive variables;
- (2) Similarities or differences between the products in customary usage, design, physical composition, and other technical characteristics;
- (3) Similarities or differences in the price movements of the products over a period of years; and
- (4) Evidence of sellers' perceptions that the products are or are not substitutes, particularly if business decisions have been based on those perceptions.²⁰⁷

In identifying the firms that should be included in the relevant product market, the new guidelines require that the Justice Department look at alternative sources of supply in addition to considering those firms currently producing and selling the relevant product. First, the Department of Justice will look at the ability of a firm not currently producing the relevant product to economically shift its production facilities in response to an increase in the price of that

firms in determining market participants. Compare Dep't of Justice Release, 1968 Merger Guidelines, at 4-7 (May 30, 1968), with 1982 Merger Guidelines, discussed at notes 208-10 *infra* and accompanying text.

204. Dep't of Justice Press Release, New Merger Guidelines (June 14, 1982) (Press Release at 7).

205. Dep't of Justice Press Release, New Merger Guidelines (June 14, 1982) (Merger Guidelines at 5).

206. *Id.*

207. *Id.* at 7.

product. If the firm can easily shift its existing productive and distributive facilities to sell and distribute the relevant product within six months of a small but significant price increase, that firm will be included in the market.²⁰⁸ Second, the Justice Department will determine the durability of the products. If recycled or reconditioned products represent viable substitutes for new products, then the Department will include in the market those firms which recycle or recondition the relevant product.²⁰⁹

Finally, the Department of Justice will consider the degree of internal consumption. Some firms which produce the relevant product may either sell it or use it themselves. Should the firms decide to consume the product internally, then they incur an opportunity cost. If the price of the product increases, the opportunity cost will also increase. Hence, the Justice Department will include in the market firms which produce internally consumable products and which will change their behavior should the market price increase.²¹⁰

The new merger guidelines are likely to force the Department of Justice to radically redefine the relevant line of commerce in the context of bank mergers. A current analysis of the availability of substitute products and alternative sources of traditional commercial banking services will show that commercial banks are facing dramatically increasing competition from other financial institutions.

V. Conclusion

The revolution in the financial marketplace has caused great changes in the banking industry. The governmental bodies most qualified to monitor this rapidly changing field are the FRB, FDIC and OCC. The agencies' expertise, as recognized by Congress, makes them the ideal watchdog over bank merger activity. Moreover, commercial banks no longer are characterized by a unique set of services which they alone offer. As the trend towards homogeneity continues in the financial services industry, the Justice Department should reevaluate its use of commercial banking as the relevant line of commerce when reviewing a proposed bank merger. Such a reevaluation is compelled by the 1982 Merger Guidelines which should lead the Department of Justice to recognize the upheaval that is currently taking place in the financial services industry.

Tommy Leung

208. *Id.* at 9-10.

209. *Id.* at 10.

210. *Id.* at 11.

